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SAVINGS ACCOUNT TRUSTS: A CRITICAL EXAMINATION

I. Introduction

For over one hundred years various American courts have recognized, on one theory or another, the validity of savings bank trust accounts.¹ Such accounts, often called "Totten trusts" after the New York case which first crystallized the doctrine,² have now been supported by decisions in nineteen jurisdictions³ and sanctioned by statute in one.⁴ The trust account has become a popular method of disposing of relatively small sums⁵ without the necessity of drawing a will or incurring the expense and inconvenience of probate.⁶

As a "poor man's will"⁷ the trust account has demonstrated its utility; but it has posed conceptual problems of some nicety to generations of judges and theorists. Most of the difficulties spring from the courts' stubborn insistence on trust terminology for a judicial creation⁸ that is not a trust at all. The doctrine

1 See generally 1 G. G. BOGERT & G. T. BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* § 47 (2d ed. 1965); 1 A. SCOTT, *THE LAW OF TRUSTS* § 58 *et seq.* (3d ed. 1967); Bogert, *The Creation of Trusts by Means of Bank Deposits*, 1 CORNELL L.Q. 159 (1916); Cohan, *Pennsylvania Tentative Trusts: Problems and Problem Areas*, 110 U. PENN. L. REV. 972 (1962); Erelli, *The Trust: Salvation by Muddle*, 12 U.C.L.A. L. REV. 190, 220 (1964); Larrimore, *Judicial Legislation in New York*, 14 YALE L.J. 312, 315-16 (1905); Moynihan, *Trusts of Savings Deposits in Massachusetts*, 22 B.U. L. REV. 271 (1942); Scott, *Trusts and the Statute of Wills*, 43 HARV. L. REV. 521, 540-44 (1930); Slatter, *Joint Accounts and Trusts Created by Bank Deposits*, 2 BROOK. L. REV. 27 (1933); the following Notes: *Revocability of Trust Deposits in Savings Banks*, 4 MINN. L. REV. 56 (1919); *Savings Bank Trusts in New York*, 37 YALE L.J. 1133 (1928); *Tentative Trust Deposits*, 39 DICK. L. REV. 37 (1934); *The Theory of the Tentative Trust*, 87 U. PENN. L. REV. 847 (1939); *Matter of Totten — An Anomaly in the Law of Trusts*, 6 DE PAUL L. REV. 117 (1956); *Totten Trusts in Kansas*, 9 KAN. L. REV. 46 (1960); *Totten Trust: The Poor Man's Will*, 42 N.C. L. REV. 214 (1963); *Bank Account Trusts*, 49 VA. L. REV. 1189 (1963); *Illinois Totten Trust*, 48 CH.-KENT L. REV. 107 (1971); and the following Annotations: 157 A.L.R. 925 (1945); 168 A.L.R. 1324 (1947); 38 A.L.R. 2d 1243 (1954); 46 A.L.R.3d 487 (1972).

2 *Matter of Totten*, 179 N.Y. 112, 71 N.E. 748 (1904). The generic term "Totten trust" is rather misleading, as not all such trusts are of the type validated in *Totten*.

3 See *Gross v. Douglass State Bank*, 261 F. Supp. 1002 (D. Kan. 1965); *Reidy v. Almich*, 4 Ariz. App. 144, 418 P.2d 390 (1966); *Kosloskye v. Cis*, 70 Cal. App. 2d 174, 160 P.2d 565 (1945); *Cressy v. Fisher*, 16 Conn. Supp. 391 (1949); *but see Fasano v. Meliso*, 146 Conn. 496, 152 A.2d 512 (1959); *Delaware Trust Company v. Fitzmaurice*, 27 Del. Ch. 101, 31 A.2d 383 (1943); *In re Scott's Estate*, 96 F. Supp. 290 (D.D.C. 1951); *Seymour v. Seymour*, 85 So. 2d 726 (Fla. 1956); *Wilder v. Howard*, 188 Ga. 426, 4 S.E. 2d 199 (1939); *Estate of Petralia*, 32 Ill. 2d 134, 204 N.E.2d 1 (1965), *aff'd*, 48 Ill. App. 2d 122, 198 N.E.2d 200 (1964); *Hale v. Hale*, 313 Ky. 344, 231 S.W.2d 2 (1950); *Littig v. Mt. Calvary Church*, 101 Md. 494, 61 A. 635 (1905); *Greeley v. Flynn*, 310 Mass. 23, 36 N.E.2d 394 (1941); *Walso v. Lattner*, 140 Minn. 455, 168 N.W. 353 (1918); *In re Damato*, 86 N.J. Super. 107, 206 A.2d 171 (1965); *Matter of Totten*, 179 N.Y. 112, 71 N.E. 748 (1904); *Merigan v. McGonigle*, 205 Pa. 321, 54 A. 994 (1903); *Petition of Atkinson*, 16 R.I. 413, 16 A. 712 (1889); *Leader Federal Savings & Loan Ass'n v. Hamilton*, 46 Tenn. App. 368, 330 S.W.2d 33 (1959); *In re Madsen's Estate*, 48 Wash. 2d 675, 296 P.2d 518 (1956). See also *RESTATEMENT (SECOND) OF TRUSTS* § 58 (1959) and comments thereto.

4 N.J. STAT. ANN. § 17:9A-216 (1963).

5 See 1 A. SCOTT, *supra* note 1, at § 56.3 n.3. The doctrine has also been applied to certificates of deposit issued to purchasers as trustees for another, as well as to Savings & Loan and building and loan accounts. See Annot. 46 A.L.R.3d 487, 492 n.4 (1972).

6 See UNIFORM PROBATE CODE § 6-104, which expressly adopts the *Totten* theory. *But see, semble contra*, § 6-104(e): trust accounts are not revocable by will — a deviation from the *Totten* doctrine.

7 Note, *Disposition of Bank Accounts: The Poor Man's Will*, 53 COLUM. L. REV. 103 (1953). Other such "wills" are survivorship ownership and life insurance. See SHAFFER, *THE PLANNING AND DRAFTING OF WILLS AND TRUSTS* 63 (1972).

8 See Larrimore, *supra* note 1.

of trust was fixed upon as a handy means of validating this species of transfer; that it did, but problems of no little difficulty were imported with it.

II. Origin and Elements of the Doctrine

A. Witzel v. Chapin

The very first American case involving a trust account⁹ sounded the major themes, and the changes have been ringing ever since. In June, 1849, William Witzel deposited five hundred dollars in his savings account, "in trust for Ann Witzel," and these words were written on the face of the bank book. There was no further evidence of the depositor's intention to create a trust. Subsequently, the depositor made deposits and—significantly—withdrawals. On his death the beneficiary, who had not known of the account during the depositor's lifetime, claimed against the depositor's administrator.

Counsel for the claimant argued that the deposit was a valid *inter vivos* gift or, alternatively, "[a]t least, such deposit was valid as an executed *trust* or *use* for the sole benefit of Ann S. Witzel,"¹⁰ and that the money was "beyond the control of the deceased except as a trustee, and his administrator has no right as such to distribute the fund among the next of kin."¹¹

Against these contentions it was asserted that the cestui could not have called upon the depositor to execute the trust nor had she any knowledge of its existence. The trust was "merely voluntary"¹² and executory. The depositor "used the fund as his own, drew it out and expended it. This is evidenced by his own acts, that he did not consider it vested."¹³ It was also argued that:

A trust being an equitable right or interest in property real or personal distinct from the real owner . . . nothing, according to this rule, could ever have vested in Ann Witzel, for she never had any interest in this fund distinct from that of the legal owner. . . .¹⁴

Finally, the operation of the Statute of Wills was impliedly invoked: ". . . could Ann Witzel have called on the deceased in his lifetime to execute this trust? If she could not, then by his death she can acquire no more extended right."¹⁵

The Surrogate reviewed various cases involving resulting trusts and joint bank accounts¹⁶ on the question of the validity of voluntary trusts with power of revocation, and found that if such trusts have been allowed to remain after the settlor's death, they should stand.¹⁷ In deciding to bring the Witzel account into

⁹ Witzel v. Chapin, 3 Bradf. Surr. 386 (1855).

¹⁰ *Id.* at 387.

¹¹ *Id.* The "control" issue, of course, cuts against the claimant; if the depositor's control was that of a trustee, his withdrawals for his own use constituted breach of trust. As it happened, his control over the money was absolute.

¹² *Id.*

¹³ *Id.* at 388.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *E.g.*, Thorpe v. Owen, 5 Beav. 244 (1842); Gaskell v. Gaskell, 2 Y. & J. 502 (1828); Wheatley v. Purr, 1 Keen 551 (1836); Stapleton v. Stapleton, 14 Sim. 186 (1840).

¹⁷ A curiously circular conclusion.

the class of valid revocable trusts the court took note of the popularity of trust accounts:

The class of deposits in savings institutions, of which the one in question in the present case is an example, is of frequent occurrence. This is a favorite mode of making trusts, and yet they are not ordinarily considered as irrevocable.¹⁸

The withdrawals made by the depositor indicated to the court that the trust was not *treated* as irrevocable,¹⁹ and the retention of power to revoke the deposit did not invalidate the trust.²⁰

The continuance of any portion of the deposit in trust is evidence of a continuation pro tanto, of the original intention, and the intestate having died, leaving the trust unrevoked as to a certain sum, the rights of the cestui que trust then became fixed.²¹

Thus the deposit itself raised a rebuttable presumption of the existence of a valid trust and the underlying intent to create such a trust.²² The creation of the trust, for the *Witzel* court, seemed to be entirely a matter of intent—a question of fact. “[T]here must be some facts inconsistent with the idea that a gift was intended” in order to invalidate the transfer.²³

The Surrogate thus articulated a doctrine under which a valid trust can arise from the deposit of money “in trust” for another, absent a showing that the depositor did not intend to establish such a trust. The form of deposit alone raises the presumption, or rather the inference, of intent; and the intent can be effectuated by means of the trust doctrine. The beneficiary need not know of the account. The funds are subject to augmentation and diminution and are subject to the depositor’s complete control; withdrawal constitutes revocation pro tanto.

The court in *Witzel*, by giving effect to the depositor’s intent, sought to recognize the general validity of a practice which had already become widespread. It considered two theories on which to sustain trust accounts. The gift theory was obviously infirm—there was no real divestiture and no real delivery—and the trust theory, though not entirely satisfactory, was obviously more congenial. It is perhaps significant that the transaction was not directly attacked as testamentary. Nor were various elements of strict trust theory applied to the facts, *e.g.*, the lack of fiduciary relationship. The inability of the beneficiary to call for execution of the trust was explained as resulting from her tenuous interest in the fund; yet this interest was not defined and appears to have been sui generis. Moreover, the position of the depositor’s creditors was not considered as it did not

18 3 Bradf. Surr. at 391.

19 *Id.*

20 *Id.* at 392.

21 *Id.* This language, remarkably similar to that employed in *Matter of Totten*, indicates that the Surrogate too regarded the trust as “tentative merely” until the depositor’s death.

22 “It is not necessary to declare generally that deposits of this character are always conclusive evidence of a trust; there may be circumstances connected with particular cases, rebutting the presumption flowing from the deposit, and showing that a trust was not intended.” *Id.*

23 *Id.*

arise under the facts.²⁴ Had the Surrogate been presented with an argument characterizing the deposit as testamentary and bearing little relation to the paradigmatic trust in that no fiduciary relationship arose and no control over the funds was ever relinquished, the decision might have been different. Yet, on the central issues of intent and control, the court was willing to sustain the validity of the trust even without precedent.

B. Irrevocable Savings Account Trusts and the Totten Case

Subsequent New York cases²⁵ and decisions in various other states²⁶ recognized the existence of a valid trust from the form of a trust account if it was the intent of the depositor to establish one. But the trust was construed as *irrevocable*;²⁷ filling in the bank book form or signature card created an immediate and complete irrevocable trust with a corresponding immediate interest in the beneficiary. This conclusion seems to have resulted from abhorrence of the indeterminate interest of the beneficiary under the *Witzel* rule. It was also partially the result of a lingering confusion of the trust account with an inter vivos gift—a confusion which has survived to the present day.²⁸ Moreover, judicial insistence on the irrevocability of the trust might well have been related to the sound general principle that a trust mandates a substantial divestment of control on the part of the settlor. In any event, if the account was seen as irrevocable the estate of the settlor could be surcharged for any amount he may have withdrawn. The advantage of the trust account was, under this interpretation, minimized. The essential issue before the court in *Matter of Totten*,²⁹ half a century after *Witzel*, was one of restoring the social utility of the trust account: how could the surcharge be avoided while still maintaining the trust character of the account?

The claimant in *Totten* claimed against the estate of the depositor for money due from savings accounts set up by the depositor as trustee for the claimant. There was no evidence of intent other than the signature cards. The depositor treated all the accounts marked "in trust for" as her own, withdrawing at will. On her death the accounts were closed and the proceeds were delivered to the named beneficiaries.

The court was unwilling to infer as a matter of fact that the decedent intended to establish an irrevocable trust in favor of the claimant.³⁰ Indeed, "[a]side from what took place when the deposits were made, every act of the decedent, with one exception,³¹ [was] opposed to the theory of a trust."³²

²⁴ *Id.*

²⁵ These cases are collected and analyzed in *Re Vaughn's Estate*, 145 Misc. 332, 260 N.Y.S. 197 (Surr. Ct. 1932). Of special interest is *Harrison v. Totten*, 53 App. Div. 178, 65 N.Y.S. 725 (1900). William H. B. Totten should perhaps have read it more carefully.

²⁶ See the exhaustive annotation which appears after the report of *Martin v. Funk*, 75 N.Y. 134 (1878).

²⁷ *Id.*

²⁸ See, e.g., *Fasano v. Meliso*, 146 Conn. 496, 152 A.2d 512 (1959).

²⁹ 179 N.Y. 112, 71 N.E. 748 (1904).

³⁰ *Id.* at 118, 71 N.E., at 750.

³¹ The exception was the closing of one account after cancelling the words "in trust for" and reopening, with part of the money, another account in the same form as the original.

³² 179 N.Y. at 118, 71 N.E. at 750.

The court noted, however, that the courts in developing the doctrine of trust accounts had sought to adapt the law to the custom of the people. Finding no mandate for declaring the trusts irrevocable as a matter of law and desiring to maintain the institution of trust accounts, the court announced a rule for their governance:

A deposit by one person of his own money, in his own name as trustee for another, standing alone, does not establish an irrevocable trust during the lifetime of the depositor. It is a tentative trust merely, revocable at will, until the depositor dies or completes the gift in his lifetime by some unequivocal act or declaration, such as delivery of the pass book or notice to the beneficiary. In case the depositor dies before the beneficiary without revocation, or some decisive act of declaration or disaffirmance, the presumption arises that an absolute trust was created as to the balance on hand at the death of the depositor.³³

III. Conceptual Variations

Matter of Totten followed the *Witzel* rule in that the effect of the deposit was to create the inference of a relationship wherein the depositor can dispose of the money as he wishes, and the beneficiary has no right of possession or enjoyment until the depositor's death. *Totten* sharpens *Witzel*, however, in several important respects. The trust account in *Witzel* could be seen as evincing a completed inter vivos transaction subject to defeasance. We shall see that the courts which construe trust accounts as giving rise to completed revocable trusts at the moment of deposit generally follow this view. But *Totten* took another tack.

The *Totten* court viewed the transaction as generating an incipient relationship that was not completed until the depositor's death.³⁴ The trust, until then, was "tentative merely"; the beneficiary's right to any of the fund was inchoate. Such is the interpretation given *Totten* by subsequent New York cases.³⁵ This conclusion is mandated by the desirability, noted earlier, of facilitating the depositor's control over the money (the genius of the entire concept). For if the transaction is interpreted as giving rise to a revocable trust, then the beneficiary must have a form of equitable ownership to comport with basic trust doctrine (even though other incidents of the trust relationship may not be present). How, then, can the depositor's ability to invade the funds—to say nothing of his creditors' ability to do the same, the sanctioning of application of the funds towards the depositor's funeral expenses, and more—be justified? The position that a trust account gives rise to a revocable trust will be criticized later; the New York courts have had this particular objection in mind for quite some time. The problem is essentially one of timing. At what moment does an enforceable trust spring into being?

The New York courts' answer has been to regard the trust deposit as

33 179 N.Y. at 125-26, 71 N.E. at 752.

34 See *Tibbits v. Zink*, 231 App. Div. 339, 341, 247 N.Y.S. 300, 303 (1931).

35 See, e.g., *Matter of United States Trust Company*, 117 App. Div. 178, 180, 102 N.Y.S. 271, 272 (1907). The dissent maintained that the trust was completely constituted at the time of deposit, subject to revocation.

establishing a *prima facie* "tentative" trust,³⁶ an admittedly novel concept.³⁷ Once this position is understood, its *sequelae* can be harmonized. Thus, the predecease of the beneficiary extinguishes the trust even if the depositor does nothing at all. The relationship is "tentative merely" and does not ripen into a proper trust until the depositor's death; the beneficiary has no real interest until then.³⁸ Similarly, it has been held that under certain circumstances the depositor's creditors can reach trust account funds after his death on the grounds that placing the funds in accounts over which he had control while alive constitutes a fraud on the creditors.³⁹ The point is that no enforceable trust arises until the depositor dies or makes the trust irrevocable.⁴⁰

Courts outside New York that have considered the issue have occasionally held that a trust account creates an irrevocable trust, absent evidence of contrary intent.⁴¹ Such a view accords with the traditional principle that trusts are irrevocable unless a power of revocation is expressly reserved.⁴² But there seems to be little advantage in opening a trust account under such a rule. It has been observed that nothing is achieved by such a transfer that could not have been accomplished by a direct gift, except perhaps postponement of the beneficiary's enjoyment.⁴³

Other jurisdictions have regarded the trust account as a revocable trust.⁴⁴ As noted above, such a view requires that an interest be vested in the beneficiary at the time the deposit is made, subject to a power of revocation in the depositor.⁴⁵ Each withdrawal is construed as a *pro tanto* revocation. Bogert states the principle supporting this view:

The uncertain nature of the trust before the depositor's death may often merely mean that the trust is subject to a power of revocation. This seems a view preferable to the "tentative" or incomplete trust theory. . . . The only effect of death of the depositor is to remove the power of revocation. It does not complete the trust, but renders it irrevocable.⁴⁶

This interpretation, at first blush, appears more congruent with traditional trust doctrine than does that of the New York courts. It is the position of Professor Scott⁴⁷ and the Restatement.⁴⁸ Yet it contains serious weaknesses, most of which

36 See, e.g., *Matter of Reich*, 146 Misc. 616, 262 N.Y.S. 623 (Surr. Ct. 1933).

37 *Id.* at 618, 262 N.Y.S. at 626 (dictum).

38 *Matter of Kelly*, 151 Misc. 277, 271 N.Y.S. 457 (Surr. Ct. 1934).

39 *Beakes Dairy Co. v. Berns*, 128 App. Div. 137, 112 N.Y.S. 529 (1908).

40 "The mere fact that the presumption of trust is created only in respect to the balance on hand in the account at the death of the depositor, demonstrates that the theory of the decision is that the 'trust' springs into being only at the moment of his death." *Matter of Reich*, 146 Misc. 616, 262 N.Y.S. 623, 626 (Surr. Ct. 1933).

41 *Rose v. Osborne*, 133 Me. 497, 180 A. 315 (1935). See *Gobeille v. Allison*, 30 R.I. 525, 76 A. 354 (1910).

42 G. G. BOGERT & G. T. BOGERT, *supra* note 1, at § 992; Note, *Savings Account Trusts*, 49 VA. L. REV. 1189, 1191 (1963).

43 Even this is doubtful. The trustee performs no duties and the beneficiary might therefore be able to compel termination of the trust. See Note, *Savings Account Trusts*, 49 VA. L. REV. 1189, 1192 (1963).

44 See, e.g., *Bollack v. Bollack*, 169 Md. 407, 182 A. 317 (1935).

45 *Kardon v. Willing*, 20 F. Supp. 471 (E.D. Pa. 1937). See Moynihan, *supra* note 1, at 276-77.

46 G. G. BOGERT & G. T. BOGERT, *supra* note 1, at § 47.

47 See A. SCOTT, *supra* note 1.

48 RESTATEMENT (SECOND) OF TRUSTS § 58 (1959).

spring from the imposition of revocable trust theory on the trust account. As an initial matter, trust accounts could, under this theory, be nullified as testamentary. Admittedly, reservation of a power of revocation, even coupled with power to modify and an equitable life interest in the settlor, will not invalidate a disposition as testamentary.⁴⁹ But the critical quantum of control is reached with the addition of the power in the settlor to do what he wishes with the funds. This situation is of a different species from the normal type of trust with incidents of control maintained by the settlor.⁵⁰ Scott acknowledges that it is "arguable" that trust accounts so regarded are testamentary dispositions and thus void unless they comply with the formalities required by the Statute of Wills.⁵¹

Of course, trust accounts under either the "tentative" or the revocable trust theory are open to the same objection, insofar as the element of control is identical in both, as is the trust established at the depositor's death. Theoretically, both tentative and revocable trust accounts are testamentary although the courts have generally refused to construe them as such. The vice in the revocable trust theory is simply the discord generated by the juxtaposition of traditional trust concepts with the trust account *in situ*. If a trust springs up at the moment of deposit, it is a trust which is riddled with exceptions to traditional doctrine. The revocable trust theory is an attempt to avoid the operation of the Statute of Wills by granting a present interest to the beneficiary immediately when the account is opened. Yet this interest is subject not only to revocation, in whole or in part, by the depositor; it is also subject to partial or complete defeasance as a result of judicially sanctioned invasion of the fund by the depositor's creditors,⁵² personal representatives,⁵³ or surviving spouse.⁵⁴ Moreover, there is no real separation of legal and equitable ownership; no fiduciary duty is imposed on the depositor; there is no real right whatsoever vested in the beneficiary.⁵⁵ These deviations from strict trust theory strip the trust account of any color of true trust. Those who contend it is a revocable trust employ a fiction to circumvent the Statute of Wills.

Yet is not the "tentative trust" doctrine equally fictitious? In broad terms it also is not a trust at all; the *Totten* court realized this and attempted to call attention to its unique constitution by use of the term "tentative"—a novel term in the law of trusts. It is at least arguable that, fiction though it be, the tentative trust theory has at least the virtue of self-consistency. It does not pretend, as does the revocable trust theory, to be something it is not. The inchoate relationship established under the *Totten* trust is indeed "tentative"; the word is completely apt. As to whether it is guilty of a more fundamental hypocrisy—i.e., going about as a "trust" when it is not one at all—two points may be made. First, the relationship that arises on the death of the settlor is indeed a trust though subject to alteration as noted above. The relationship obtaining before that time between the depositor and his beneficiary is *not* a trust, and the "tentative trust" doctrine

49 A. SCOTT, *supra* note 1, at § 58.3.

50 *Id.* at § 58.5.

51 *Id.* at § 58.3.

52 *See, e.g.,* *Banca D'Italia & Trust Co. v. Giordano*, 154 Pa. Super. 452, 36 A.2d 242 (1944).

53 A. SCOTT, *supra* note 1, at § 58.6; G. BOGERT, *supra* note 1, at § 104.

54 *See, e.g.,* *Matter of Halpern*, 303 N.Y.S. 33, 100 N.E.2d 120 (1951).

55 *See* Note, *Tentative Trust Deposits*, 39 DICK. L. REV. 37, 38 (1934).

does not say it is. It is an anticipatory relationship, awaiting the vesting of the beneficiary's interest, at which point it ripens into a trust. Second, it must be remembered that the tentative trust is a judicial creation; and the New York courts have been candid parents indeed. When the rival revocable trust theory appeared,⁵⁶ its advocates maintained that the "incomplete" transfer sanctioned by the tentative trust theory was testamentary and void. Rather than cast out the idea of trust accounts altogether or adopt the theoretically unsatisfying revocable trust theory, the New York courts merely admitted that the tentative trust was not much of a trust, and it was indeed testamentary.⁵⁷ The tentative trust, they argued, should be recognized "in its true character as an alternate method of decedent devolution, which, in certain aspects at least, is of essentially testamentary character."⁵⁸ It appears that whatever else the tentative trust might be, it is no hypocrite.

The tentative trust theory is of great practical utility and has been adopted outside New York.⁵⁹ Its chief practical advantage over the revocable trust theory is its flexibility, which has enabled courts to rely upon traditional trust principles or to go farther afield in the attempt to effectuate the intention of the depositor.⁶⁰

The difficulties entailed by the trust account's unique status and underlying testamentary nature are neatly solved by legislation in New Jersey.⁶¹ New Jersey courts had at first rejected the *Totten* doctrine as violative of both traditional trust theory and the Statute of Wills,⁶² whereupon a statute allowing banks to pay the fund to the named beneficiary was passed.⁶³ The statute was modified in 1932 in order to compel banks to pay the beneficiary rather than the depositor's personal representative,⁶⁴ but the courts remained unwilling to enforce trust accounts until the New Jersey Supreme Court construed the 1932 legislation in favor of the beneficiary of a trust account opened in 1931. The statutes, said the court,

... were undoubtedly fashioned on the premise that the maintenance of such an account demonstrated the existence of a donative intent and that this intent should be accorded full effect through the instrumentality of a gift revocable pro tanto by the depositor-trustee's withdrawals. In short, the Legislature has provided for a method whereby property may be transferred to another upon death. It is of no moment that the transaction does not satisfy the demands of the Statute of Wills or of the common law concept of gifts. The Legislature is free to modify these, and here did so.⁶⁵

56 See Judge Ingraham's dissent in *Matter of United States Trust Co.*, 117 App. Div. 178, 182, 102 N.Y.S. 271, 273 (1907).

57 See *Matter of Reich*, 146 Misc. 616, 618, 262 N.Y.S. 623, 626 (Surr. Ct. 1933), where Surrogate Wingate recommends that the courts should "designate a common excavating implement by its lexicographical appellation."

58 *Matter of Weinberg*, 162 Misc. 867, 868, 296 N.Y.S. 7, 10 (Surr. Ct. 1937).

59 *Seymour v. Seymour*, 85 So. 2d 726 (Fla. 1956); *Rodgers' Estate*, 374 Pa. 246, 97 A.2d 789 (1953); *Katz v. Greeninger*, 96 Cal. App. 2d 245, 215 P.2d 121 (1950).

60 See *McWilliams' Estate*, 38 Pa. D. & C. 93 (Orphans' Ct. 1940); Note, *Savings Account Trusts*, 49 VA. L. REV. 1189, 1194 (1963).

61 N.J. STAT. ANN. § 17:9A-216 (1963).

62 *Nicklas v. Parker*, 69 N.J. Eq. 743, 61 A. 267 (1905), *aff'd* 71 N.J. Eq. 777, 71 A. 1135 (1907).

63 N.J. LAWS 1906, ch. 195, § 26. Such statutes are common and have generally been construed as protecting the bank only and not declaring rights as between the contesting parties. See A. SCOTT, *supra* note 1, at § 58.3 & n.7.

64 N.J. LAWS 1932, chs. 40-43.

65 *Howard Savings Inst. v. Kielb*, 38 N.J. 186, 202, 183 A.2d 401, 409 (1962).

The New Jersey trust account is thus cut loose from strict trust theory. It has some incidents of the tentative trust (*e.g.*, the trust terminates on the predecease of the beneficiary⁶⁶) and some of the revocable trust (*e.g.*, the depositor is presumed to intend that a present interest vest in the beneficiary at the time of deposit⁶⁷). Resultant confusion in interpretation, however, is minimized by the clear statutory intent—to give effect to trust accounts, now divested of the ill-fitting guise of trust.

IV. Problems in Praxis

All trust accounts, be they tentative, revocable, or statutory, generate certain problems. Some difficulties are conceptual and have been discussed above. Others arise in practice although they are exacerbated or even caused by theoretical considerations.

The landmarks in the geography of trust account theory are all paradoxes. For example, if the beneficiary is held to receive no present interest until the death of the depositor, the transfer is clearly testamentary.⁶⁸ If, on the other hand, the beneficiary receives an immediately vested interest in the funds, the ability of the depositor to do what he likes with the funds, his creditors' right to invade them, the extinction of the trust should the beneficiary predecease him, etc., are clear violations of the trust relationship. In both situations, the reservation of the depositor's right to control the funds, normally a relatively unobjectionable incident of inter vivos trusts,⁶⁹ has been extended to the point where it collides with the interest of the beneficiary and raises serious questions as to the certainty of the trust's subject matter. Finally, there is no doubt that an attempted transfer of such property as the donor may own at his death is ineffective during his life and also after his death unless he has complied with the Statute of Wills.⁷⁰

In ascertaining the subject matter of the trust account two alternatives are available. The trust may consist of the funds originally deposited. If this is so, the depositor's complete control violates the certainty requirement: at no point during the depositor's life can the beneficiary say that he is entitled to \$X, nor can he say so after the depositor's death, until his estate is settled. Yet the revocable trust theory must view the money placed in the original deposit as trust funds. Alternatively, the subject-matter might be said to be the balance on deposit at the depositor's death, in which case the transfer is obviously testamentary. The position taken by the New York courts entails this result.

The issue of control is another nub of difficulty. The retention of control by the depositor of a trust account is almost complete. The "trust," measured against traditional standards, has been attacked as "illusory"⁷¹ although its illusory character depends largely on the identity of the parties disputing it. The depositor's control is evinced by his ability to dispose of the fund as he wishes and by his immunity from the normal duties of a trustee. For example, he is under no duty

66 N.J. STAT. ANN. § 17:9A-216 (1963).

67 *Id.*

68 A. SCOTT, *supra* note 1, at § 56.

69 *Id.* at § 57.2.

70 *Id.* at § 56.2.

71 See, *e.g.*, Newman v. Dore, 275 N.Y.S. 371, 9 N.E.2d 966 (1937).

to preserve the trust property, the duty not to leave funds on deposit in banks for an inordinate length of time is clearly inapplicable, and there is no duty to segregate trust and personal funds.

Yet another factor consistent with the depositor's complete ownership of the funds is his tax liability. A trust account is an incomplete transfer for the purposes of all federal taxes. Gift tax is inapplicable;⁷² during the depositor's life, the income is taxable.⁷³ Upon his death, the funds are included in his gross estate for estate tax purposes.⁷⁴ (In a revocable trust doctrine jurisdiction it is arguable that since an "interest" passed to the beneficiary at the time of the deposit, transfer tax is inapplicable. This reasoning has apparently been accepted in Pennsylvania.⁷⁵) The taxation of trust accounts thus provides an island of consistency—the funds are considered to be the depositor's own.

The rights of creditors to trust account assets are by no means clearly defined, and a congeries of difficulties has arisen concerning them. As a matter of hornbook law, the reservation of a power of revocation does not in itself enable creditors of the settlor to reach trust funds.⁷⁶ Yet creditors are granted this right in the case of trust accounts,⁷⁷ at least during the lifetime of the depositor.⁷⁸ This result comports with general trust doctrine, however, if the tentative trust theory is applied. If a settlor is also a beneficiary of the trust, his creditors can generally reach his beneficial interest.⁷⁹ In the case of a tentative trust it is arguable that since the depositor never relinquished any beneficial interest in the funds, his creditors should be able to reach the entire amount. The revocable trust position, however, demands the opposite conclusion. If a present interest vests in the beneficiary (subject to the condition subsequent of revocation) at the moment of deposit, the depositor's creditors are in no better position than general creditors of the settlor of a revocable trust. This appears to be the rule in Maryland;⁸⁰ notwithstanding the control vested in the depositor, the funds are insulated from his creditors—further evidence of the anomalies which arise when strict trust concepts are inconsistently applied under the revocable trust theory. Surely this is a case in which the trust veil—which, in any event, is rather transparent in the case of trust accounts—can be lifted.

The tentative and revocable trust doctrines also lead to different conclusions when creditors assert their claims after the depositor's death. Under the tentative approach, the trust arises on the death of the depositor. So, conceptually speaking, does his estate. If the estate is insolvent, the trust constitutes a transfer made while the depositor was insolvent (i.e., the moment of his death) and can be set aside

72 Treas. Reg. § 25.2511-2(c) (1972).

73 INT. REV. CODE OF 1954, §§ 671, 676(a).

74 Wasserman v. Commissioner, 139 F.2d 778 (1st Cir. 1944); INT. REV. CODE OF 1954, § 2038(a). See generally Lewis, *Powers Retained by the Settlor of a Trust: Their Income, Estate, and Gift Tax Treatment*, 5 REAL PROP., PROB. & TRUST J. 1, 5 (1970).

75 In re Mines, 31 Pa. D. & C. 153 (C.P. 1937). *Contra*: Peterman's Estate, 56 D. & C. 365 (Orphans' Ct. 1946); accord, *semble*, McGary Estate, 355 Pa. 232, 49 A.2d 350 (1946).

76 A. SCOTT, *supra* note 1, at § 330.12.

77 Rights of set-off, however, are rarely granted. See *Union Trust Co. v. Mullineaux*, 173 Md. 124, 194 A. 823 (1937).

78 See, e.g., *Banca D'Italia & Trust Co. v. Giordano*, 154 Pa. Super. 452, 36 A.2d 242 (1944).

79 A. SCOTT, *supra* note 1, at § 330.12.

80 See *Fairfax v. Savings Bank*, 175 Md. 136, 199 A. 872 (1938).

as a fraud on those of his creditors who had claims outstanding when he died.⁸¹ Funeral and administration expenses, although not covered by the fraud principle, can still be paid from trust account assets if the depositor's remaining estate is insufficient because the presumption that the depositor intended a decent burial for himself outweighs the presumption that he desired the trust account funds to pass.⁸² A clearly fraudulent transfer, of course, can always be set aside, any balance remaining after satisfaction of creditors' claims to be paid to the beneficiary.⁸³ Under the revocable trust analysis (although the problem has not squarely arisen) it would seem that, a completed transfer having occurred at the time of deposit, subsequent creditors could not employ the fraud argument.⁸⁴ The doctrine might even result in insulation of the trust funds from the depositor's creditors, even though he retains complete control. This situation, apparently sanctioned by the Maryland courts,⁸⁵ is yet another anomalous result of the revocable trust theory.

A few courts have been presented with claims against trust account assets made by the depositor's surviving spouse.⁸⁶ Such claims arise when the spouse elects to claim against the depositor's will or to claim the statutory share of an intestate depositor's estate. To overcome the spouse's presumed inability to reach trust property, it must be shown that the quantum of control maintained over the assets by the decedent in life was so great as to vitiate the trust as such, rendering it "illusory."⁸⁷ If the trust was indeed illusory, it is void as a testamentary transfer.⁸⁸

The courts have announced no clear rule under which the result of a claim by the surviving spouse can be predicted. It would seem that the doctrine under which the trust account is sustained would substantially control the result—*i.e.*, in tentative trust jurisdictions, where the depositor maintains complete beneficial and legal ownership, the claim should be allowed; whereas in revocable trust jurisdictions, in which an interest is said to vest in the beneficiary upon deposit, the contrary should be true. In fact this is not the case. The controlling factor in the decisions seems to be the definition of "illusory" employed by the court—no matter what the theoretical justification for the trust account might be.⁸⁹

The New York criterion for a nonillusory transfer, articulated in the 1937 case of *Newman v. Dore*,⁹⁰ is bona fide divestiture of control by the transferor. The courts utilized this test in a line of cases⁹¹ to strike down tentative trusts as illusory when used to deprive the surviving spouse of his share. The rationales for these decisions may owe more to the weighing of interests represented by the trust account institution and the statutes providing for survivors' election than to a

81 Matter of Reich, 146 Misc. 616, 262 N.Y.S. 623 (Surr. Ct. 1933).

82 See Note, *Bank Account Trusts*, 49 VA. L. REV. 1189, 1201 (1963).

83 Matter of Weinberg, 162 Misc. 867, 296 N.Y.S. 7 (Surr. Ct. 1937).

84 See *Fairfax v. Savings Bank*, 175 Md. 136, 199 A. 872 (1938).

85 *Id.*

86 See, *e.g.*, Matter of Halpern, 303 N.Y. 33, 100 N.E.2d 120 (1951); *Black Estate*, 73 Pa. D. & C. 86 (Orphans' Ct. 1950). But see *Iafolla Estate*, 380 Pa. 391, 110 A.2d 380 (1955); *Whittington v. Whittington*, 205 Md. 1, 106 A.2d 72 (1954).

87 A. SCOTT, *supra* note 1, at § 58.5.

88 *Id.* at § 57.2.

89 Note, *Bank Account Trusts*, 49 VA. L. REV. 1189, 1205 (1963).

90 275 N.Y. 371, 9 N.E.2d 966 (1937).

91 See, *e.g.*, *Krause v. Krause*, 285 N.Y. 27, 32 N.E.2d 779 (1941); *Steixner v. Bowery Sav. Bank*, 86 N.Y.S. 2d 747 (Sup. Ct. 1949).

finding that tentative trusts are per se illusory. (The latter view leads inexorably to the conclusion that tentative trusts are testamentary and void *ab initio*.) However, in 1951 the Court of Appeals reversed the trend of the cases. In *Matter of Halpern*⁹² the court announced in a very strong dictum that there is nothing illusory about a tentative trust. It becomes completely effective on the depositor's death and an inalienable interest vests in the beneficiary. Thus, even a partial award which had been made by the Surrogate's Court was wrong. If the trust is not illusory, it is good; and if it is good, it is all good. The trust fund, by its mere existence, raises an inference of valid transfer.⁹³ The transfer, of course, occurs at death, and the depositor's good faith divestiture thus occurs at that moment. The rule in *Halpern* seems to be that the transfer represented by a trust account is illusory only if the depositor can be shown not to have intended that the funds pass on his death to the beneficiary. Such a rule produces evidentiary problems of some magnitude, but there is an additional reason for disapproving it. It obviously widens the class of transfers that will be upheld to include some—chiefly, transfers engineered to deprive the surviving spouse of his share—which are violative of statute and public policy. Scott observes that "surely it is possible to hold that by the creation of such a trust the settlor may avoid the formalities involved in the making of a will, but may not accomplish a result which he could not accomplish by a will, namely to cut out the surviving spouse."⁹⁴ The Restatement takes the position that, although the surviving spouse normally cannot reach property transferred by the decedent in trust subject to a life estate and power of revocation remaining in the decedent, an exception should be made in the case of a trust deposit. "The surviving spouse of a person who makes a savings deposit upon a tentative trust can include the deposit in computing the share to which such surviving spouse is entitled."⁹⁵

The New York legislature adopted the Restatement view in 1965 by an amendment to the Decedent Estate Law.⁹⁶ The balance on deposit at the death of one whose spouse exercises the right of election is treated as a testamentary provision and is included in the net estate. Pennsylvania enacted a similar statute.⁹⁷ New Jersey's statutory sanction of trust accounts has protected them from all attacks save those based on traditional equitable grounds;⁹⁸ none has yet been challenged by a surviving spouse, but the claim would probably fail. In Maryland, a revocable trust theory jurisdiction, it has been held that a trust account can be successfully attacked if it is illusory; and the test for illusoriness involves a showing of intent to defraud.⁹⁹ Such a result is remarkable only in view of the fact that *only* the surviving spouse can challenge a trust account on the ground that it is illusory.¹⁰⁰ The identity of the party attacking the trust thus seems to control the result. In all the jurisdictions that have considered the matter,

92 303 N.Y. 33, 100 N.E.2d 120 (1951).

93 See *Matter of Ward*, 279 App. Div. 616, 107 N.Y.S. 2d 817 (2d Dept. 1951).

94 A. SCOTT, *supra* note 1, at § 58.5.

95 RESTATEMENT (SECOND) OF TRUSTS § 58, comment e (1959).

96 § 18-a (Laws 1965, c. 665).

97 PA. STAT. ANN. tit. 20, § 301.11 (Supp. 1962), as amended PA. STAT. ANN. tit. 20, § 6111 (Spec. Pamphlet 1972).

98 *Ward v. Marine Nat'l Bank*, 38 N.J. 132, 183 A.2d 60 (1962).

99 See, e.g., *Mushaw v. Mushaw*, 183 Md. 511, 39 A.2d 465 (1944).

100 Note, *Bank Account Trusts*, 49 VA. L. REV. 1189, 1205 (1963).

the trust account's status as trust has been suspended, at least partially, when it conflicts with the surviving spouse's elective right—a clear case of subordination of the wishes of the dead to the interests of the living.

There appears to be substantial consistency in the courts' position on revocation of trust accounts. The Restatement catalogues five manners in which a trust account can be terminated in whole or in part.¹⁰¹ Each constitutes a "decisive . . . declaration of disaffirmance" under the *Totten* test.¹⁰² Virtually all of the courts take the Restatement's liberal view and hold the trust revoked when some declaration of the depositor, regardless of its form or whether made inter vivos or by will, sufficiently expresses or implies the intent to revoke.

- 1) Withdrawal operates as a pro tanto revocation; the beneficiary is entitled to the balance on hand at the depositor's death.
- 2) The death of the beneficiary prior to the death of the depositor terminates the trust absolutely. This position is consistent with the tentative theory but has been adopted in revocable trust theory jurisdictions as well.¹⁰³
- 3) If the depositor disposes of the trust funds by will in favor of someone other than the beneficiary revocation pro tanto is deemed to have occurred. Except in Maryland it is now settled that a trust account can be revoked by a provision in the depositor's will indicating—expressly or impliedly—that such was his intent.¹⁰⁴ A specific provision of the will money in favor of a third person revokes the trust,¹⁰⁵ but a mere residuary clause cannot per se revoke the trust.¹⁰⁶ Curiously, in view of the willingness of the courts to effectuate the depositor's intent, an invalid will—even coupled with the intent to disaffirm—cannot revoke a trust account in New York;¹⁰⁷ but it can do so in Pennsylvania.¹⁰⁸
- 4) If the depositor becomes insane funds may be withdrawn insofar as necessary for his welfare.¹⁰⁹
- 5) If the depositor makes the trust irrevocable, he cannot thereafter revoke it.¹¹⁰

When an inter vivos declaration or a will does not revoke the trust expressly but is alleged to do so by implication, the courts tend to look at the *res gestae* surrounding the action in order to determine the depositor's real intent. The factors considered are very similar to those examined when the issue is establishment of a trust by means of a deposit, but some are unique—for example, courts can inquire whether the depositor's nontrust assets are sufficient to satisfy his will dis-

101 § 58, comment c.

102 179 N.Y. at 126, 71 N.E. at 752.

103 See *Matter of United States Trust Co.*, 117 App. Div. 178, 102 N.Y.S. 271 (1st Dept. 1907); *Hyman v. Tarplee*, 64 Cal. App. 2d 805, 149 P.2d 453 (1944); N.J. STAT. ANN. § 17:9A-217A (1963).

104 See, e.g., *Matter of Krycun*, 24 N.Y.2d 710, 301 N.Y.S.2d 970, 249 N.E.2d 753 (1969).

105 *Matter of Ludwig*, 207 Misc. 860, 140 N.Y.S.2d 742 (Surr. Ct. 1955).

106 *Matter of Greniewich*, 243 App. Div. 811, 278 N.Y.S. 279 (1935).

107 *Re Ryan's Will*, 52 N.Y.S.2d 502 (Surr. Ct. 1944).

108 *Bearinger's Estate*, 336 Pa. 253, 9 A.2d 342 (1939).

109 *Matter of Sabot*, 28 Misc. 2d 265, 212 N.Y.S.2d 842 (Sup. Ct. 1961).

110 *Matter of LaBrasche*, 301 N.Y. 718, 95 N.E.2d 404, 96 N.E.2d 92 (1950).

positions. If they are inadequate, several courts have held the trust revoked by implication, at least in part.¹¹¹ In general, the courts are as willing to give effect to the depositor's desire to revoke the trust account as they are to give effect to his desire to establish one; the pivotal issue in both cases is the depositor's intent.¹¹²

IV. Conclusion

The value of the trust account—its utility and convenience as a will substitute—must be measured against the abuses to which it is subject in practice and the confusion and inelegance of its theory.

Among potential abuses are the following: avoidance of bank regulations; avoidance of restrictions on charitable bequests;¹¹³ avoidance, where permitted, of the surviving spouse's right of statutory election; and avoidance of probate on large amounts.

The theoretical objections might appear largely irrelevant. The trust account, as an institution, is thriving under at least two different rationales, both of which involve violation of the Statute of Wills. Yet when problems arise in the management or application of a trust account, appeal must be made to theory; if the theory is confused and inelegant, the solution will be confused and inelegant, and the law will be yet another bit muddier. A solid, defensible position must be found.

The solution need not be complex; but it must involve facing two facts squarely: the trust account is a testamentary transfer and it is not a trust. The answer is legislation, for only legislatures can contravene the Statute of Wills. Thoughtful legislation can circumvent the abuses noted above and bring a refreshing and overdue clarity to the law of trust accounts.¹¹⁴ Thirty years ago Professor Moynihan—and he was by no means the first—set out the task the legislatures should perform:

It is submitted that the most effective way to deal with the problem of post-mortem dispositions of savings deposits is directly by legislation. It should be frankly recognized that the real intent behind most deposits in trust . . . is a testamentary one. To meet the needs of a multitude of persons a simple method for providing for the disposition of the deposit on death, alternative to that provided by the Statute of Wills, should be provided. Resort to the overworked fiction of a trust should not be necessary. . . .¹¹⁵

In providing a cogent theory of trust deposits, legislation could restore order to an unclear area of the law and protect the interests and desires of the general public.

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¹¹¹ See, e.g., *Matter of Beck*, 260 App. Div. 651, 23 N.Y.S.2d 525 (1940). See also Annot., 46 A.L.R.3d, 487 (1972).

¹¹² See Bogert, *The Creation of Trusts by Means of Bank Deposits*, 1 CORNELL L.Q. 159 (1916); Moynihan, *Trusts of Savings Accounts in Massachusetts*, 22 B.U. L. REV. 271, 276-77 (1942).

¹¹³ See A. SCOTT, *supra* note 1, at §§ 58.5, 362.6.

¹¹⁴ The cases decided under the New Jersey legislation are straightforward, e.g., *In re Kloppenberg*, 82 N.J. Super. 117, 196 A.2d 800 (1964); *In re Estate of Posey*, 89 N.J. Super. 293, 214 A.2d 713 (1965); *In re Damato*, 86 N.J. Super. 107, 206 A.2d 171 (1965).

¹¹⁵ Moynihan, *supra* note 112, at 285.